

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

YOSHIO KADOMA WHITE,

Petitioner,

v.

SANDRA CARTER,

Respondent.

Case No. C06-5061 RJB/KLS

ORDER ADOPTING  
REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of Magistrate Judge Karen L. Strombom (Dkt. 27) and the plaintiff's objections thereto (Dkt. 28). The Court has reviewed the Report and Recommendations, the plaintiff's objections, and the file herein.

**I. BACKGROUND AND DISCUSSION**

The petitioner is currently serving a 500 month sentence at the Stafford Creek Corrections Center pursuant to his 1999 conviction for first degree murder. On January 1, 2002, the petitioner filed his first petition for habeas corpus. *White v. Carter*, No. 02-5006RJB (W.D. Wash. Dec. 29, 2003). The petitioner filed this writ of habeas corpus on February 2, 2006. Dkt. 1.

On April 12, 2006, Magistrate Judge Strombom issued a Report and Recommendation, recommending that this matter be dismissed with prejudice as time barred pursuant to 28 U.S.C. §2244(d). Dkt. 14. The Court declined to adopt the Report and Recommendation, holding that

1 review of the state court record was necessary to determine whether the petition was time barred or  
2 whether an exception to the time bar applied. Dkt. 16 at 3.

3 On November 30, 2006, Magistrate Judge Strombom issued a Report and Recommendation,  
4 recommending that the petition be transferred as a second or successive petition and that the file be  
5 administratively closed. Dkt. 27. The petitioner filed objections conceding that his petition raises  
6 unexhausted claims and requesting that his petition be denied without prejudice so that he may  
7 continue to pursue such claims in state court. Dkt. 28 at 5.

8 The petitioner does not deny that his petition is a second or successive petition and that he  
9 did not seek leave to file such a petition. He appears to ask the Court to exercise discretion in  
10 dismissing his petition without prejudice rather than transferring his petition to the Ninth Circuit  
11 Court of Appeals. Dkt. 28 at 5. The Court is not vested with such discretion:

12 Any petitioner seeking leave to file a second or successive 2254 petition or 2255 motion in  
13 the district court must file an application in the Court of Appeals demonstrating entitlement  
14 to such leave under 28 U.S.C. § 2244 or 2255. . . . If a second or successive petition or  
motion, or an application for leave to file such a petition or motion, is mistakenly submitted  
to the district court, the district court **shall** refer it to the court of appeals.

15 U.S.Ct. of App. 9th Cir. Rule 22-3(a) (emphasis added). The Court should therefore adopt the  
16 Report and Recommendation, transfer the petition to the Ninth Circuit Court of Appeals as a second  
17 or successive petition, and administratively close the file.  
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## 19 **II. ORDER**

20 Therefore, it is hereby

21 **ORDERED** that

- 22 (1) The Court adopts the Report and Recommendation (Dkt. 27);
  - 23 (2) The petition is **TRANSFERRED TO THE NINTH CIRCUIT COURT OF**  
24 **APPEALS AS A SECOND OR SUCCESSIVE PETITION**; and
  - 25 (3) The Clerk is directed to **ADMINISTRATIVELY CLOSE THIS FILE**.
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1 The Clerk of Court is directed to send copies of this Order to the petitioner, counsel for  
2 respondent, and to the Hon. Karen L. Strombom.

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4 DATED this 3<sup>rd</sup> day of January, 2007.

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7 Robert J. Bryan

8 United States District Judge  
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